IN THE

Supreme Court of the United States

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OCTOBER TERM 1966

No. 1031

DANIEL LOVALL SPIGNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Judgment Affirming Judgment of the United States District Court for the Southern District of California, Southern Division.

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Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Judgment Affirming Judgment of the United States District Court for the Southern District of California, Southern Division.

This is a petition of Daniel Lovall Spigner for Writ of Certiorari to review the Judgment and Order made by the United States Court of Appeals for the Ninth Circuit on December 8, 1966, affirming the Judgment against Petitioner made and entered by the United States District Court for the Southern District of California, Southern Division, on May 2, 1966, after a jury verdict of guilty had been returned on all three counts of the Indictment on March 29, 1966.

A copy of the affirming judgment and of the Opinion of the United States Court of Appeals for the Ninth Circuit, which are as yet unreported, are attached. (Appendices A and B, respectively). On December 29, 1966,

the Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States, issued an Order Extending Time to File Petition for Writ of Certiorari to February 6, 1967. (Appendix C).

Jurisdiction

The District Court had jurisdiction in this case under Title 21 U.S.C., § 176(a) and Title 18 U.S.C., § 545.

The Circuit Court had jurisdiction under Title 28 U.S.C., § 1291 and § 1294.

This Court has jurisdiction under Title 28 U.S.C., § 1254(1) to review the judgment in question.

Statement of the Case

On February 2, 1966, a three-count indictment was filed against Petitioner charging him in Counts I and II with violating Title 21 U.S.C., § 176(a) (smuggling and concealing marijuana) and in Count III with violating Title 18 U.S.C., § 545 (smuggling merchandise).

On March 29, 1966, after a trial by jury, a verdict of guilty was returned on all counts of the indictment. The judgment sentencing the Petitioner to the custody of the Attorney General for a period of six years and a Notice of Appeal were both filed on May 2, 1966. On May 18, 1966, an Order issued permitting Petitioner to appeal in forma pauperis. On June 9, 1966, an order issued extending the time for filing the record and docketing the appeal.

On December 8, 1966, the United States Court of Appeals for the Ninth Circuit affirmed the Judgment of Conviction. On December 29, 1966, the Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States, issued an Order Extending Time to File the Petition for Writ of Certiorari to February 6, 1967.

Questions Presented

1. Whether the United States Court of Appeals for the Ninth Circuit erroneously interpreted the pronouncements of this Court in *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed 2d 694 and *Johnson v. New Jersey,* 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 by applying the "non-retroactivity" doctrine in the Federal Courts.

2. Whether in light of this Court's decisions in *Malloy v. Hogan,* 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed 2d 653, *Murphy v. Waterfront Commission of New York,* 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed 2d 678, *Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed 2d 106 and *Spevack v. Klein,* United States Supreme Court Bulletin B625 (January 16, 1967), the prior decision of *Yee Hem v. United States,* 268 U.S. 178, 45 S. Ct. 470, 69 L. Ed 904 and related cases should be overruled, and, in connection therewith;

A. Whether that portion of Title 21 U.S.C. § 176(a) which provides

> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury"

constitutes a violation of the Fifth Amendment to the United States Constitution (Freedom from self-incrimination) in that said section produces a statutory compulsion to testify or explain without any further constitutional safeguards, irrespective of whether a cautionary instruction is given.

B. Whether the explanation given by the trial judge as to the difference between "actual" and "construc-

tive" possession in light of the provisions of Title 21 U.S.C., § 176(a) were confusing, erroneous and prejudicial.

C. Whether in fact the evidence was insufficient as a matter of law to show that the Petitioner knowingly transported or smuggled narcotics across the United States border, either circumstantially or otherwise.

1. Whether the connection between the fact of possession of marijuana and the presumption that the defendant smuggled such marijuana into the United States is so tenuous as to make that presumption a violation of due process of law.

Statutes and Constitutional Provisions Involved

The relevant Constitutional statutory provisions are printed in Appendix D. They are:

Title 21 U.S.C. § 176(a); Title 18 U.S.C. § 545; Fifth and Sixth Amendments to the United States Constitution

Statement of the Facts[1]

John T. Lavelle, an inspector for the United States Immigration Service, observed the Petitioner entering the United States from Mexico at about 9:00 p.m. on December 19, 1965. Petitioner was driving a 1955 Cadillac automobile and had four chalk cats lying on the back seat of the car. (R.T. 27). Petitioner stated he had been

[1] Because of the late date on which this counsel for Petitioner was retained, counsel has been unable to procure the Reporter's Transcript on appeal. As a result, counsel was compelled to rely on the Statements of Fact and Reporter's Transcript citations contained in the Appellant's and Appellee's Opening Briefs on Appeal. The indulgence of this Court is sought in the event any citations contained herein are erroneous. Page references are to the Reporter's Transcript on Appeal.

to the races but Mr. Lavelle testified that he did not see any programs or racing papers in the car and that the races were over about 6:00 p.m. Mr. Lavelle further testified that Petitioner seemed to be nervous. (R.T. 29). Mr. Lavelle had been an inspector for twenty years (R.T. 26).

Inspector Lavelle turned Petitioner over to Customs Inspector Claude Yates for further search (R.T. 33). Mr. Yates directed the vehicle and Petitioner to the secondary inspection area and performed a search of Petitioner and the vehicle. A personal search of Petitioner was negative (R.T. 34). The search of the vehicle disclosed marijuana debris and seeds under the rear seat that had been wet and sprouted and parts and bits of marijuana debris behind the quarter panel on the opposite side and in the trunk. (R.T. 41). Upon taking the ashtray out of the arm rest and peering into the right quarter panel, Inspector Yates observed a revolver. Upon removing the arm rest panel, Inspector Yates found 23 packages of what appeared to be marijuana and two loaded revolvers. Petitioner told the inspectors the automobile belonged to him. (R.T. 60).

After finding the marijuana and guns, Customs Agent Randolph Aros was called to the Port of Entry to interrogate the Petitioner. The marijuana and guns were turned over to him (R.T. 40-44). After advising Petitioner of his Constitutional rights,[2] Petitioner stated, in essence, that the vehicle belonged to one Joe Smith who

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[2] Although the Government agents attempted to advise Petitioner of his Constitutional rights, it was conceded by the Government in its Brief on appeal that the Petitioner was not told that he had the right to have an attorney appointed for him if he could not afford counsel. The argument in connection with this issue will be more fully set forth in the subsequent paragraphs of this Petition.

lived near the 4000 Block on Compton Avenue in Los Angeles. Petitioner did not at this time mention the Jordan Downs Housing Project. (R.T. 92). At this point, Petitioner apparently refused to further discuss the case. (R.T. 90-92).

Petitioner testified that he had gone to Mexico to the races with one Joe Smith and that Smith had told him that he was going to return to Los Angeles with a lady friend and left the vehicle for Petitioner to return to Los Angeles and leave at Petitioner's residence in Los Angeles. Petitioner unequivocally denied knowledge of any contraband in the automobile (R.T. 59-60). Petitioner testified that Joe Smith lived near him in the Jordan Downs Housing Project (R.T. 69-79) and denied telling Mr. Aros that Joe Smith lived in the 4000 block of Compton Avenue. (R.T. 70-71). Petitioner further denied telling Mr. Aros that he was to meet someone. (R.T. 76).

Petitioner claimed to have been drinking in bars from 6:00 to 9:00 p.m. on December 19 and estimated that he drank five "rum and cokes". (R.T. 77). Inspector Yates later testified that he searched the Petitioner in a 6 x 6 closed room and noticed no smell of alcohol. (R.T. 86-87).

It is clear from the testimony of Randolph Aros that he did not advise the Petitioner that if he could not afford counsel, one would be provided for him (R.T. 89). Aros also testified that Petitioner made no remarks regarding the marijuana or guns found in the car. (R.T. 90). On cross-examination the witness Aros testified that he had verified that the automobile in question was registered to one Joe Smith of 68 E. 45th Street, Los Angeles, California. The witness testified that no attempt was made to find the owner of the car. (R.T. 94).

Reasons for Granting the Writ

1. In light of the Circuit Court's holding that this Court's pronouncements in *Miranda v. Arizona, supra,* are not to be retroactively applied in the *Federal* Courts, a clear delineation by this Court as to whether the "non-retroactivity" doctrine is to be applied in the Federal Courts is needed.

2. In light of this Court's decisions in *Malloy v. Hogan, supra, Murphy v. Waterfront Commission of New York, supra, Griffin v. California, supra* and *Spevack v. Klein, supra,* the issue of whether *Yee Hem v. United States, supra,* is now out of harmony with this Court's recent pronouncements and should be overruled is squarely presented.

Argument

1. Whether the United States Court of Appeals for the Ninth Circuit erroneously interpreted the pronouncements of this Court in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed 2d 694 and Johnson v. New Jersey, 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed 2d 882, by applying the "non-retroactivity" doctrine in the Federal Courts.

In its Opinion, the Circuit Court of Appeals made the following statement:

> "Appellant urges that 'certain statements' made by him after his arrest were inadmissible because contrary to the rule announced in *Miranda v. Arizona,* 384 U.S. 436, (1966). Assuming that the statements made come within the *Miranda* rule, that rule was held not retroactive to persons whose trials had not begun as of June 13, 1966 (*Johnson v. New Jersey,* 384 U.S. 719, 730 (1966).) Appellant was tried on

March 29, 1966. Hence the *Miranda* rule does not apply to him."

It is respectfully submitted that the application by the Circuit Court of the "non-retroactivity" rule of *Johnson v. New Jersey, supra,* to a Federal Court prosecution constituted prejudicial and reversible error.

While it cannot be doubted that this Court in *Johnson v. New Jersey, supra,* held that the principles of *Miranda v. Arizona* were to be prospectively applied only, it is equally clear that this Court's enunciation of the "non-retroactivity" rule was directed solely and exclusively to State court prosecutions. The following language from *Miranda* clearly indicates that the rules set forth therein had been the law in the Federal Courts for a number of years. Consequently, it was not necessary for nor did this Court intend to apply the "non-retroactivity" rule to a Federal Court prosecution. In *Miranda,* the Court stated:

> "The question in these cases is whether the privilege is fully applicable during a period of custodial interrogation. In this Court, the privilege has consistently been accorded a liberal construction. . . .
>
> *"This question in fact, could have been taken as settled in Federal Courts almost 70 years ago,* when in *Bram v. United States,* 168 U.S. 532, 542 (1897) this Court held:
>
> 'In criminal trials, in the Courts of the United States, whenever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person "shall be compelled in any criminal case to be a witness against himself".'
>
> "....

"Because of the adoption by Congress of Rule 5(a) of the Federal Rules of Criminal Procedure and this Court's effectuation of that Rule in *McNabb v. United States,* 318 U.S. 332, (1943), and *Mallory v. United States,* 354 U.S. 449 (1957) we have had little occasion in the past quarter century to reach the Constitutional issues in dealing with Federal interrogations. *These supervisory rules, requiring production of an arrested person before a commissioner 'without unnecessary delay' and excluding evidence obtained in default of that statutory obligation, were nonetheless responsive to the same considerations of Fifth Amendment policy that unavoidably face us now as to the States. . . .*" (Emphasis added) (384 U.S. 436, 16 L.Ed.2d 715, 716.)

As can be readily discerned from the foregoing quote, it has been the Federal rule for a substantial period of time that the principles of *Miranda* apply to Federal prosecutions. In essence, *Miranda* sets forth four requirements which must be complied with before a statement or admission given by a defendant is admissible into evidence. Thus, the defendant must be warned that (1) he has a right to remain silent; (2) that any statement he does make may be used as evidence against him; (3) that he has a right to be represented by counsel of his own choosing and (4) that if he cannot afford counsel, counsel will be appointed for him. (*Miranda v. Arizona, supra,* 16 L. Ed 2d 706, 707)

Since it is conceded that the Petitioner herein was not told that if he could not afford counsel, one would be appointed for him, it is respectfully submitted that the judgment of conviction must be reversed in that statements of Petitioner which were admitted into evidence were obtained in violation of the V and VI Amendments to the U.S. Constitution as set forth in *Miranda, supra.*

2. Whether in light of this Court's decisions in Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed 2d 653, Murphy v. Waterfront Commission of New York, 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed 2d 678, Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed 2d 106 and Spevack v. Klein, United States Supreme Court Bulletin B 625 (January 16, 1967), the prior decisions of Yee Hem v. United States,[3] 268 U.S. 178, 45 S. Ct. 470, 69 L. Ed 904 and related cases should be overruled, and, in connection therewith;

A. Whether that Portion of Title 21, U.S.C. § 176(a) which provides

> *"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury"*

constitutes a violation of the Fifth Amendment to the United States Constitution (freedom from self-incrimination) in that said section produces a statutory compulsion to testify or explain without any further constitutional safeguards, irrespective of whether a cautionary instruction is given.

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[3] *Yee Hem v. United States, supra,* is apparently the first and only case which directly holds that a presumption identical to that set forth in Title 21 U.S.C. § 176(a) does not violate the defendant's privilege against self-incrimination. Other cases have, however, sustained the reasoning, if not the principle, enunciated in *Yee Hem* (see e.g., *Casey v. U.S.*, 276 U.S. 413, 48 S. Ct. 373, 72 L. Ed 632; *Bozza v. U.S.*, 330 U.S. 160, 67 S. Ct. 645, 91 L. Ed 818, and *United States v. Gainey*, 380 U.S. 63, 85 S. Ct. 754, 13 L. Ed 2d 658.) It is respectfully submitted that if this Court deems it appropriate to overrule *Yee Hem*, the language in *Casey, Bozza* and *Gainey* approving *Yee Hem* must be disavowed.

Title 21 U.S.C. § 176(a), after setting forth the substantive offense proscribed therein, provides:

> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

It is respectfully submitted that the above quoted presumption of § 176(a) constitutes a violation of the defendant's privilege against self-incrimination in that the defendant is compelled to testify or suffer a judgment of conviction on no more evidence than the fact of possession and the existence of the presumption. A review in chronological order of the significant cases in this area serves to buttress Petitioner's contentions.

Apparently *Yee Hem v. United States, supra,* 268 U.S. 178, 45 S. Ct. 470, 69 L. Ed 904 is the first and only case which directly holds that a presumption such as that contained in § 176(a) does not violate the Fifth Amendment's proscription against testimonial compulsion. The Court indicated that the presumption was merely a rule of evidence and to be valid there need only be a rational connection between the fact proved (in the instant case — possession) and the ultimate fact presumed (in the instant case — smuggling of marijuana). In one ill-advised paragraph, the Court stated, in answer to the defendant's contention that the presumption violated his Fifth Amendment rights:

> ". . . The statute compels nothing. It does no more than to make possession . . . prima facie evidence of guilt. It leaves the accused entirely free to testify or not, as he chooses." (268 U.S. 178, 185)

The Court concluded by saying that if the accused is the only person who can rebut the presumption, that is a problem inherent in the case and one for which the presumption is not at fault.

Since *Casey v. United States,* 276 U.S. 413, 48 S. Ct. 373, 72 L. Ed 632, involved a presumption somewhat different than that involved in both *Yee, Hem* and the instant case,[4] the case is not extremely significant with respect to the instant case, except insofar as the court therein used reasoning similar to that employed in *Yee Hem.*

Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed 1519, is the next significant case. In *Tot,* the court, in dealing with the presumption contained in the Federal Firearms Statute, held that the presumption was invalid. The basis of the court's decision was that there was no rational connection between the fact proved (possession of a firearms by a felon) and the ultimate fact presumed (that the firearm was shipped or transported in *inter*state commerce). The court reasoned that it was quite possible that the defendant had obtained the firearms from an *intra*state shipment and, therefore, the connection between the fact proved and the fact presumed was too tenuous.

Tot is also most important because of the statement made by Justice Black in a concurring opinion (in which Justice Douglas joined). Although *Yee Hem* would seem to have laid to rest the issue of the applicability of the Fifth Amendment to a presumption such as is contained in § 176(a), such is apparently not the case in light of Justice Black's statement that:

[4] The presumption in *Casey* provided that the absence of the required stamp for a package of morphine was prima facie evidence that a person in possession of the morphine was guilty of obtaining the morphine illegally.

"It is unnecessary to consider whether this statute, which puts the defendant against whom no evidence of guilt has been offered in a procedural situation from which he can escape conviction only by testifying, compels him to give evidence against himself in violation of the Fifth Amendment." (319 U.S. 463, 473.)

In *United States v. Gainey,* 380 U.S. 63, 85 S. Ct. 754, 13 L. Ed 2d 658, the court upheld the presumption that mere presence at an illegal still was sufficient to convict a person for carrying on the business of operating a distillery. Strong dissents were filed by both Justices Black and Douglas. In his dissent, Justice Black stated:

"The undoubted practical effect of letting guilt rest on unexplained presence alone, is to force a defendant to come forth and testify, however much he may think doing so may jeopardize his chances of acquittal, since if he does not he almost certainly destroys those chances. This is compulsion, which I think runs counter to the Fifth Amendment's purpose to forbid convictions on compelled testimony. The compulsion here is of course more subtle and less cruel physically than compulsion by torture, but it is nonetheless compulsion and it is nonetheless effective. I am aware that this Court in *Yee Hem v. United States,* 268 U.S. 178, 185, 69 L. Ed 904, 906, 45 S. Ct. 470, held that use of a presumptious squeeze like this one did not amount to a form of compulsion forbidden by the Fifth Amendment. The court's reasoning was contained in the single paragraph, the central argument of which was that despite a presumption like this a defendant is left 'entirely free to testify or not as he chooses'. That argument it seems to me, would also justify admitting in evidence a confession extorted by policemen pointing a gun at

the head of the accused, on the theory that the man being threatened was entirely free to confess or not, as he chooses. I think the holding in *Yee Hem* is completely out of harmony with the Fifth Amendment's prohibition against compulsory self-incrimination, and I would overrule it. . . ." (380 U.S. 63, 87-88).

Although both *Malloy v. Hogan*[5] 378 U.S. 1, 84 S. Ct. 1489, 12 L. ed 2d 653 and *Murphy v. Waterfront Commission of New York*[6] 370 U.S. 52, 84 S. Ct. 1594, 12 L. Ed 2d 678, pre-dated *Gainey*, this Court, in spite of the remonstrations of Justices Black and Douglas, did not choose to re-examine in *Gainey* the issue of the effect of the presumption involved in that case on the defendant's Fifth Amendment rights. It may well have been that *Gainey* did not present the proper facts on which to examine the *Yee Hem* rule since the presumption there involved constituted much less of a compulsion to testify than that involved in the instant case.

The next decision by this Court relevant to the issue here under discussion is *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed 2d 106, reh. den. 381 U.S. 957, 85 S. Ct. 1797, 14 L. Ed. 2d 730. In *Griffin*, this Court held unconstitutional that portion of the California Constitution which permitted comment by the prosecution on the failure of the defendant to testify. The Court also held unconstitutional and violative of the Fifth

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[5] In *Malloy*, this Court held that the Fifth Amendment's proscription against compulsory self-incrimination applied to the States through the Fourteenth Amendment.

[6] In *Murphy*, this Court held that one jurisdiction could not compel a witness to whom it had granted immunity from prosecution under its laws to give testimony which might then be used to convict him of a crime against another jurisdiction.

Amendment the Court's instruction that the failure to testify constituted evidence of guilt.

The import of *Griffin* on the issues here under discussion can best be understood when it is remembered that the Court in *Yee Hem* stressed the point that the presumption therein involved (which is identical to the one involved in the instant case) was no more than a *rule of evidence. Griffin* rejected such reasoning and held that such a rule of evidence violated the constitutional prohibitions of the Fifth Amendment. In *Griffin,* the court stated:

> "... The question remains whether, statute or not, the comment rule, approved by California, violates the Fifth Amendment.
>
> "We think it does. It is in substance a *rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify. No formal offer of proof is made as in other situations; but the prosecutor's comment and the Court's acquiesence are the equivalent of an offer of evidence and its acceptance.* The Court in the *Wilson* case stated:
>
> '... The act was framed with a due regard also to those who might prefer to rely upon the presumption of innocense which the law gives to everyone, and not wish to be witnesses. It is not everyone who can faithfully venture on the witness stand though entirely innocent of the charges against him. Excessive timidity, nervousness, when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not everyone, however honest, who would,

therefore, willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him.' (149 U.S., P. 66, 37 L. Ed. P. 651)" (Emphasis added.) (380 U.S. 609, 613.)

Two other cases are worthy of mention. In *United States v. Romano,* 382 U.S. 136, 86 S. Ct. 279, 15 L. Ed 2d 210, perhaps influenced to some extent by the *Griffin* decision, this Court held invalid the presumption which provided that the defendant's presence at an illegal still was sufficient evidence to authorize a conviction for being in possession, custody and control of an illegal still, unless the defendant explained his presence to the satisfaction of the jury.

In the recent case of *Spevack, v. Klein, United States Supreme Court Bulletin B 625* (January 16, 1967), this Court overruled the case of *Cohen v. Hurley,* 366 U.S. 117, 81 S. Ct. 954, 6 L. Ed. 2d 156 and held that an attorney, as in the case of any other individual, is entitled to the full protection of the Fifth Amendment. The *Spevack* decision, undoubtedly represents a further erosion of the principles of prior cases which fail to afford the Fifth Amendment the veneration to which it is entitled.

In light of the foregoing analysis, and especially in light of *Griffin v. California, supra,* it is respectfully submitted that *Yee Hem* is out of harmony with the recent Fifth Amendment decisions of this Court and should be overruled. While it may ease the judicial conscience to say that a presumption such as is contained in § 176(a)

is merely a rule of evidence, such sophistry cannot obscure the true fact that such a presumption either compels the defendant to testify or suffer a finding of guilt. In fact, Instruction No. 10[7] given to the jury in this case was tantamount to instructing the jury to find the Petitioner guilty. No cautionary instruction, no matter how carefully worded, can serve to erase from the jury's mind the fact that they may convict with no more evidence before them than the fact that defendant was in possession of the contraband.[8]

Petitioner concedes that the presumption here under discussion relates to the first and second Counts of the Indictment only. It is submitted, however, that the very existence of the presumption, the manner in which it was read to the jury and the instructions taken as a whole clearly indicate that the jury may well have believed that the presumption applied to Count III as well as Counts I and II. Certainly the jury was not instructed that the presumption related to Counts I and II only.

---

[7] Instruction 10 was given as follows: Title 21, Section 176(a) of the United States Code provides in part as follows:

> "Whenever on trial for a violation of this subsection the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury." (Marihuana — 21 USC Sec. 176(a) — Sale, Possession-Statutory Presumption)

[8] It should be noted that a peripherally related issue is raised in connection with the presumption of § 176(a). Specifically, assuming the Petitioner's exculpatory statements were admissible, the only direct evidence which rebutted such testimony was the presumption itself. Arguably, if the presumption is invalid, the only remaining evidence is that of the Petitioner's exculpatory statements. Since the prosecution elicited such statements, it would seem that is should be bound by them and that a conviction could not be had as a matter of law. See e.g., *People v. Collins*, 189 Cal.App.2d 575, 11 Cal.Rptr. 504.

B. Whether the explanation given by the trial judge as to the difference between "actual" and "constructive" possession in light of the provisions of Title 21 U.S.C. § 176(a) were confusing, erroneous and prejudicial.

An examination of the instructions given by the trial court, viewed together with its "explanations" of "actual" and "constructive" possession leads to the inescapable conclusion that the court in fact instructed the jury to find the Petitioner guilty. The comments by the court in instructing the jury on actual and constructive possession are set forth in Appendix E hereof. The court's comments presumed knowledge of the contraband and left for the jury to determine merely whether the possession was actual or constructive. Nowhere in its comments did the court state or even infer to the jury that if Petitioner did not know the existence or presence of the contraband he would not be in actual or constructive possession. Such a statement should have been made by the court since the cases have emphasized that possession must be a "knowing" possession. *Jackson v. United States,* 330 Fed. 2d 679, 681 (8th Cir. 1963).

It is submitted that the court's comment on the instructions constituted prejudicial error. In *Starr v. United States,* 153 U.S. 614, 14 S. Ct. 919, 38 L. Ed. 841, this Court stated that the influence of the trial judge on a jury is necessarily and properly of great weight and his slightest word or intimation may be controlling. Since the comments made by the Court left no room for the jury to find that the Petitioner was not in possession of the contraband at all, it is submitted that the Court in fact inferred to the jury that the Petitioner was guilty of having either actual or constructive possession.

C. Whether in fact the evidence was insufficient as a matter of law to show that the Petitioner knowingly transported or smuggled narcotics across the United States border, either circumstantially or otherwise.

1. *Whether the connection between the fact of possession of marijuana and the presumption that the defendant smuggled such marijuana into the United States is so tenuous as to make that presumption a violation of due process of law.*

It is submitted that the evidence presented by the prosecution was insufficient as a matter of law to sustain a conviction on any of the three counts of the Indictment. The evidence in this case indicates that on December 19, 1965, the Petitioner was driving a 1955 Cadillac automobile across the border from Mexico to the United States and that the automobile contained contraband. Petitioner at all times denied knowledge of the contraband and indicated that the automobile belonged to one Joe Smith. This latter fact was verified by a Government agent (R.T. 94). While it is true that knowledge may be shown by circumstantial evidence, such evidence must create more than a mere suspicion. *Spalitto v. United States,* 39 Fed 2d 782 (8th Cir. 1930). It is submitted that the facts that Petitioner denied knowledge of the contraband, that the car was not Petitioner's and that Petitioner's testimony was essentially unrefuted presents a situation wherein the evidence was insufficient as a matter of law to sustain a conviction.

Assuming arguendo that the presumption of § 176(a) is held valid (see discussion, *supra*) it is submitted that the connection between the fact proved in the instant case (possession) and the ultimate fact presumed (smuggling into the United States and concealing marijuana) is too tenuous. *Tot v. United States, supra.* It is almost the subject of judicial notice that marijuana is grown,

albeit illegally, in many areas of the United States. There are numerous cases on record in the State and Federal Courts in California wherein prosecutions were made for illegally growing marijuana. Since marijuana can be and is grown in the United States, how can it be reasonably said that from the fact that a person is found in possession of marijuana it may be presumed he smuggled marijuana into the United States. Under the circumstances, the inference becomes ". . . so strange as not to have a reasonable relation to the circumstances of life as we know them". *United States v. Romano, supra,* at p. 213. In *Tot v. United States, supra,* the court stated:

> "Whether the statute in question be treated as expressing the normal balance of probability, or as laying down a rule of comparative convenience in the production of evidence, it leaves the jury free to act on the presumption alone once the specified facts are proved, unless the defendant comes forward with opposing evidence. And this we think enough to vitiate the statutory provisions.
>
> "Doubtless the defendant in these cases knew better than anyone else whether they acquired the firearms or ammunition in interstate commerce. It would, therefore, be a convenience to the Government to rely upon the presumption and cast on the defendants the burden of coming forward with evidence to rebut it. But as we have shown, it is not permissible for us to shift the burden by arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation. The argument from convenience is admissible only where the inference is a permissible one, where the defendant has more convenient answers to the proof, and where requiring him to go forward with proof will not subject

him to unfairness or hardship." (319 U.S. 463, 469-470).

Conclusion

Petitioner respectfully submits that a review of the record in this case will indicate that this Petition for Writ of Certiorari should be granted and that the Judgment of the Circuit Court affirming the judgment of the District Court should be reversed.

Respectfully submitted,

B. MARKS
BURTON MARKS,
Attorney for Petitioner.

EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL LOVALL SPIGNER,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.
No. 21,187

APPEAL from the United States District Court for the Southern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Southern Division

.....

.....and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court in this Cause be, and hereby is.....

Filed and entered Dec. 8, 1966.

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL LOVALL SPIGNER,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 21,187

[December 8, 1966]

Appeal from the United States District Court for the Southern District of California Southern Division

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Before: BARNES, JERTBERG and BROWNING, Circuit Judges PER CURIAM:

This is an appeal from a verdict of guilty on each count of a three count indictment, charging the appellant with (a) smuggling 30 lbs. of marijuana into the United States; (b) concealing and transporting said 30 lbs. of marijuana within the United States; and (c) smuggling certain merchandise, viz. two revolvers and certain ammunition, into the United States. The court below had jurisdiction (21 U.S.C. § 176(a); 18 U.S.C. § 545), and so do we (28 U.S.C. § 1291).

This appeal raises two questions:

1. The sufficiency of the evidence

There is no merit to the contention that there was insufficient evidence to sustain the conviction. See *Glasser v. United States,* 315 U.S. 60, 80 (1942). Appellant urges that "certain statements" made by him after his arrest were inadmissible because contrary to the rule announced

in *Miranda v. Arizona,* 384 U.S. 436 (1966). Assuming that the statements made come within the *Miranda* rule, that rule was held not retroactive to persons whose trials had not begun as of June 13, 1966. (*Johnson v. New Jersey,* 384 U.S. 719, 730 (1966).) Appellant was tried on March 29, 1966. Hence the *Miranda* rule does not apply to him.

2. The examples

Appellant objects to certain examples given by the trial judge (when instructing the jury), in explanation of the difference between "actual" and "constructive" possession, and between "joint" and "sole" possession. Without stating why or in what manner the illustrations were erroneous, appellant urges they were "unfair" and "confused" and did "mislead" the jury. We do not agree. We think they were of aid to a proper consideration of the case.

We find appellant had a fair trial, and no error exists. We *affirm.*

EXHIBIT C

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1966

DANIEL LOVALL SPIGNER,

Petitioner,

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 6, 1967.

S/ W. O. DOUGLAS

Associate Justice of the Supreme Court of the United States

Dated this 29th day of December, 1966.

EXHIBIT D

Title 21 U.S.C. Section 176(a)

Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

As used in this section, the term "marihuana" has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. Feb. 9, 1909, c. 100, § 2(h), as added July 18, 1956, c. 629, Title I, § 106, 70 Stat. 570.

Title 18 U.S.C. Section 545

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States, in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

The term "United States", as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam. June 25, 1948, c. 645, 62 Stat. 716; Aug. 24, 1954, c. 890, § 1, 68 Stat. 782; Sept. 1, 1954 c. 1213, Title V, § 507, 68 Stat. 1141; June 30, 1955, c. 258, § 2(c), 69 Stat. 242.

AMENDMENT V UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

EXHIBIT E

Comments by the Court in Instructing the Jury

The law recognizes two kinds of possession. The first category is actual and constructive possession. I best can give you illustrations of what I mean by actual and constructive possession.

Mrs. Pusey in the first seat in the jury box wore her wristwatch today. She is in actual possession of that wristwatch. Had she not put that wristwatch in the glove compartment of her car when she came into the courtroom, she would now be in constructive possession of that watch because she knows where the watch is and she would have the power to reduce it to actual possession at any time, and the law therefore says that she is in constructive possession of that wristwatch.

We define it legally as follows: A Person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. A Person who, though not in actual possession, knowingly has the power and the intention at a given time to exercise dominion or control over a thing either directly or through another person or persons is then in constructive possession of it.

Now, the law also recognizes that possession may be sole, or joint, and again, I will give you an example of that.

If Mrs. Pusey drove the family car down to the Court house today, while she was in the car, she was in actual possession of it, and she was in sole possession of it, but had she told her husband, "Now I'm going to leave the car on the parking lot and you have got keys to the car; if you want it, go down and get it," then the two of them would be in joint possession of that automobile because either one would have the power to go down and get it. This would be a constructive possession, not an

actual possession, bcause they are away from the car. Therefore, possession can be joint or sole.

Now, this instruction is given in connection with this merchandise found in the vehicle, if you find it was so found, to determine who had possession of it, either actual or constructive, or whether it was sole or joint possession. (R.T. 130-132.)

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1031

DANIEL LOVALL SPIGNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1966 (Pet. App. A). On December 29, 1966, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to February 6, 1967 (Pet. App. C), and the petition was filed on

that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's statements made to customs officers were properly admitted in evidence.

2. Whether 21 U.S.C. 176a, in allowing the jury to infer knowledge of illegal importation from possession of marihuana, violates the Fifth Amendment, either because it compels the defendant to testify in his own behalf or because there is no rational connection between the fact of possession and the inference of guilty knowledge.

3. Whether there was sufficient evidence to establish petitioner's knowing possession of the marihuana.

4. Whether certain instructions by the trial court were confusing or otherwise prejudicial.

STATUTE INVOLVED

21 U.S.C. 176a provides in part:

> Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of California of

smuggling (Count 1) and concealing (Count 2) marihuana in violation of 21 U.S.C. 176a, and of smuggling merchandise (Count 3) in violation of 18 U.S.C. 545. On May 2, 1966, he was sentenced to imprisonment for six years on Counts 1 and 2, and for three years on Count 3, all terms to be served concurrently. The court of appeals affirmed the convictions *per curiam*.

The evidence showed that on December 19, 1965, petitioner was stopped at the Mexican border at San Ysidro in California. After petitioner stated that he was a returning United States citizen, a customs agent observed four chalk cats in the rear seat. Thinking this purchase unusual, the agent referred petitioner to a secondary inspection area where he was personally searched (Tr. 26-28, 34).[1] At this time, petitioner claimed that he owned the car (Tr. 34). A search of the car revealed thirty pounds of marihuana and marihuana debris and seeds underneath the rear seat and in the trunk (Tr. 35, 44). Agent Yates also discovered a loaded revolver and holster concealed in the right side arm rest (Tr. 35). Petitioner was then advised of his right against self-incrimination, and was offered the use of a telephone to call an attorney; the offer was declined (Tr. 89). Upon questioning by customs agent Aros, petitioner recanted his previous claim to ownership of the automobile and said it belonged to a Joe Smith who lived "somewhere in the four thousand block, Comp-

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[1] "Tr." designates Transcript of Trial filed with the Clerk of this Court.

ton Avenue in Los Angeles" (Tr. 90). He refused to discuss the case any further. A subsequent independent investigation by customs officers revealed that the automobile was registered in the name of Joseph Smith, whose address was 68 East 45th Street, Los Angeles (Tr. 93).

Petitioner testified that he went to Mexico to watch the races with Joe Smith; that Joe Smith later told him to drive his automobile back to Los Angeles alone, as he (Smith) was going to return to Los Angeles with a girl friend whom he met in Mexico. Petitioner testified that after having a few drinks he returned to the border, where he was apprehended, and that he had no knowledge at the time that the marihuana and other contraband were concealed in the automobile.

ARGUMENT

1. Petitioner contends that it was error to admit into evidence his two statements—that he owned the automobile and (later) that the automobile was owned by Joseph Smith—on the ground that the customs officers failed to advise him that if he were financially unable to retain an attorney the court would appoint one for his defense. He cites *Miranda* v. *Arizona*, 384 U.S. 436. But assuming *arguendo* that his statements were made to the customs officers during a custodial interrogation—the only situation to which the *Miranda* decision applies—petitioner can take no comfort from that decision since his trial was

commenced prior thereto. *Johnson* v. *New Jersey*, 384 U.S. 719.[2]

2. Petitioner contends that the provision of 21 U.S.C. 176a that possession of marihuana "shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury" is inconsistent with the self-incrimination and due process clauses of the Fifth Amendment.

a. There is no occasion to re-examine this Court's holding in *Yee Hem* v. *United States*, 268 U.S. 178, that the legislative inference allowed by 21 U.S.C. 174 (which in this respect is identical to that in 21 U.S.C. 176a) does not compel the defendant to testify in his own behalf. Cf. *United States* v. *Gainey*, 380 U.S. 63. If petitioner chooses not to explain his possession of the marihuana, the jury may, but it is not compelled to, infer that he was aware of the illegal importation. No compulsion in the constitutional sense is involved. The choice remains with petitioner. To be sure, he may be convicted if he fails to testify in his own behalf—but that is true in every case where the government makes a *prima facie* show-

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[2] Petitioner in effect asks reconsideration of the *Johnson* decision, in which this Court declined to apply *Miranda* retrospectively. He relies primarily upon a statement made by the Chief Justice, writing for the majority in *Miranda*, that the applicability of the Fifth Amendment to custodial interrogation had been decided some seventy years ago in *Bram* v. *United States*, 168 U.S. 532. Never, however, until *Miranda*, had this Court held that the failure to advise an accused of his right to appointment of counsel violated the Fifth Amendment.

ing of guilt. In addition, a defendant can exculpate himself through the evidence of other witnesses, not only through his own testimony.

b. Notwithstanding the argument that it "is almost the subject of judicial notice that marijuana is grown, albeit illegally, in many areas of the United States" (Pet. 19-20), the presumption of illegal importation has consistently been held rational and valid. This conclusion is especially forceful in a case like this where the marihuana is in an "unmanicured" form. *Caudillo* v. *United States*, 253 F. 2d 513 (C.A. 9), certiorari denied *sub nom. Romero* v. *United States*, 357 U.S. 931; *Butler* v. *United States*, 273 F. 2d 436 (C.A. 9); *United States* v. *Taylor*, 266 F. 2d 310 (C.A. 7), certiorari denied, 361 U.S. 853; *Anthony* v. *United States*, 331 F.2d 687 (C.A. 9). We stress the additional fact in this case that petitioner was apprehended at the border upon his return from Mexico. In these circumstances, at least, petitioner cannot tenably deny a rational connection between the fact of his possession and the inference of illegal importation.

3. Petitioner further contends that, even if the legislative inference allowed by 21 U.S.C. 176a is valid, there was insufficient evidence to establish that he had knowing possession of the marihuana and other contraband. Knowing possession may be proved circumstantially (*Evans* v. *United States*, 257 F. 2d 121, 128 (C.A. 9), certiorari denied, 358 U.S. 866; *United States* v. *Pinna*, 229 F. 2d 216, 218 (C.A. 7)), and proof that one has exclusive control and

dominion over the property on or in which contraband marihuana is found is sufficient to establish knowledge of the presence of such marihuana (*Travis* v. *United States*, 362 F. 2d 477 (C.A. 9), certiorari denied, 385 U.S. 885; *Evans* v. *United States*, *supra*; *Bass* v. *United States*, 326 F. 2d 884, 886-887 (C.A. 8), certiorari denied, 377 U.S. 905; *Johnson* v. *United States*, 270 F. 2d 721, 723 (C.A. 9)). The facts set forth in the Statement, *supra*, pp. 2-4, amply justify the conclusion that petitioner knew the marihuana was in the automobile, and that he had possession and control over the marihuana. In the circumstances, the jury was entitled to disbelive petitioner's denial of knowledge.

4. Petitioner complains that certain instructions by the court explaining the difference between actual and constructive possession (Pet. App. E) were confusing and prejudicial. Specifically, he argues that the court assumed knowing possession on the part of petitioner and conveyed that assumption to the jury. However, just prior to the portion of the charge about which petitioner complains, the court instructed (Tr. 129-130):

> The court advises you, of course, that [possession within the meaning of 21 U.S.C. 176a] must be a knowing possession.
>
> * * * *
>
> Thus, if you find from the evidence, beyond a reasonable doubt, that there was possession, as that term will be defined to you, on the part of the defendant of any of the marijuana referred

> to in the indictment, such possession creates a permissible inference of guilt as charged in the indictment.

It is presumed that the jury followed all the court's instructions and so found that petitioner did in fact have a knowing possession of the marihuana before it considered the legislative inference. See *Della Paoli* v. *United States*, 352 U.S. 232, 242; *Opper* v. *United States*, 348 U.S. 84, 95.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

MARCH 1967.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1031

DANIEL LOVALL SPIGNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1031

DANIEL LOVALL SPIGNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

This is a Petition for Rehearing of the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit heretofore filed by the Petitioner. Since the filing of the original Petition for Writ of Certiorari, an intervening circumstance of substantial and controlling affect, has occurred,[1] namely, the discovery by Petitioner's counsel of the decision in the case of *United States v. Jackson*, 262 F.Supp. 716 (D.Conn., Jan. 9, 1967).[2]

[1] See e.g., Sanitary Refrigerator Co. v. Winters, 280 U.S. 30, 34, footnote 1, 50 Sup.Ct. 9, 10, 74 L.Ed. 147; Massey v. United States, 291 U.S. 608, 54 Sup.Ct. 532, 78 L.Ed. 1019; and Schrieber-Schroth Co. v. Cleveland Trust Co., 305 U.S. 47, 50, 59 Sup.Ct. 8, 9, 83 L.Ed. 34, 35.

[2] Counsel for Petitioner is informed that the Jackson case has been appealed directly to this Court pursuant to the provisions of Title 18, U.S.C. §3731.

Petitioner herein incorporates by reference the jurisdictional citations, Statement of the Case, Statutes and Constitutional Provisions Involved and Statement of the Facts set forth in his original Petition for Writ of Certiorari.

New Question Presented

In addition to the questions set forth in his original Petition, and in light of the decision in *United States v. Jackson, supra,* the following new and novel question is presented:

> Whether Title 21, U.S.C. §176(a)[3] is unconstitutional in violation of Amendment VI to the United States Constitution in that it impairs a defendant's free exercise of his right to trial by jury.

Argument

In *United States v. Jackson, supra,* the provisions of Title 18, U.S.C. §1201(a) were before the Court for interpretation. That section provides in pertinent parts, as follows:

> "Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully seized, . . . kidnaped . . . or carried away and held for ransom or reward or otherwise, . . . shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of

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[3] The relevant portion of Title 21 U.S.C. §176(a) provides:

> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

the jury shall so recommend, or, (2) by imprisonment for any term of years or for life, if the death penalty is not imposed."

It is respectfully submitted that almost identical considerations are present in connection with the statute involved in the instant case (Title 21 U.S.C. §176(a)) as were involved in *Jackson*. Thus, in a trial by the court sitting without a jury, even if a defendant charged with a violation of §176(a) is shown to have been in possession of the contraband, he apparently is under no obligation to "explain his possession" to anyone's satisfaction. Said in another way, the presumption arising from mere possession of the contraband apparently does not exist in a non-jury trial.[4]

It can be readily seen, therefore, that by exercising his absolute right to a jury trial (Amendment VI, United States Constitution) the defendant must accept the responsibility of explaining his possession of the contraband to the satisfaction of the jury, an onus which he is not subject to if he waives trial by jury.

Finally, but most significantly, it must be noted that the Government has an absolute right to demand a jury trial even if the defendant desires to waive that right. *Singer v. United States*, 380 U.S. 24, 85 Sup.Ct. 783, 13 L.Ed.2d 630. Accordingly, by refusing to waive jury, the Government may actually force upon the defendant

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[4] The conclusion that the defendant does not have the obligation to explain his possession of the contraband to anyone's satisfaction in a non-jury trial is buttressed by the fact that §176(a) provides that the defendant must "explain his possession to the satisfaction of the *jury*." (Emphasis added). The section does *not* say that the defendant must explain his possession to the satisfaction of the *trier of fact*.

the burden of explaining his possession of the contraband to the satisfaction of the jury.

Conclusion

Based on the foregoing, and on the arguments set forth in the original Petition for Writ of Certiorari, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted and that the Judgment of the Circuit Court affirming the Judgment of the District Court should be reversed.

Respectfully submitted,

MARKS & SCHNEIDER

By BURTON MARKS

Attorney for Petitioner

CERTIFICATE OF COUNSEL

I, Burton Marks, counsel for the Petitioner herein, certify that the attached Petition for Rehearing of the Petition for Writ of Certiorari to the United Court of Appeals for the Ninth Circuit is presented in good faith and not for delay. I further certify that the said Petition for Rehearing is restricted to the grounds specified therein.

BURTON MARKS